

2011

**THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY**

**ROAD TRANSPORT (ALCOHOL AND DRUGS)
LEGISLATION AMENDMENT BILL 2011**

EXPLANATORY STATEMENT

**Circulated by authority of
Jon Stanhope MLA
Minister for Transport**

Road Transport (Alcohol and Drugs) Legislation Amendment Bill 2011

Outline

This Bill amends the *Road Transport (Alcohol and Drugs) Act 1977*, the *Road Transport (Driver Licensing) Regulation 2000*, the *Road Transport (General) Act 1999*, the *Road Transport (Offences) Regulation 2005*, the *Crimes Act 1900* and the *Spent Convictions Act 2000*.

In summary, the amendments will:

- provide for the enforcement of the zero blood alcohol concentration (BAC) introduced last year for driver supervisors, assessors and instructors while they are accompanying a learner driver;
- ensure that random drug testing powers introduced last year also apply to driver supervisors, assessors and instructors when accompanying learner drivers, consistent with other Australian jurisdictions;
- provide that foreign licence holders from countries that are recognised by Austroads as having driver licence standards equivalent to Australian requirements will be subject to the same BAC as the ACT equivalent licence class, while drivers from non-recognised countries will be regarded as special drivers, and subject to a zero BAC;
- reduce pressure on hospital staff by allowing blood samples to be taken by a doctor or nurse at a sampling facility other than a hospital;
- update terminology in line with the road transport legislation by replacing the concepts of *public street* and *public place* with *road* and *road related area*;
- clarify police powers to search persons taken into custody for alcohol or drug testing and allow police to remove weapons or other dangerous items that could harm the person or other people at the police station, hospital or sampling facility;
- clarify that where a person is suspected of the offence of driving while intoxicated, the person may be asked to provide a body sample under section 16 for testing for the presence of a prescribed drug even though it has not been practicable or possible to carry out a drug screening test first;
- amend the *Road Transport (Driver Licensing) Regulation 2000* to explain that it is only foreign drivers who hold a licence from a country recognised by Austroads that are regarded as holding a licence that corresponds to an ACT licence of an equivalent class; and
- make numerous consequential amendments, including amendments to evidentiary certificate provisions and definitions, and amendments to update references to offences listed in the Schedule to the *Road Transport (Offences) Regulation 2005*. There are also minor consequential amendments to the *Road Transport (General) Act 1999*, the *Spent Convictions Act* and the *Crimes Act 1900*.

The amendments in the Bill that engage the rights under the *Human Right Act 2004* are the amendments to provide for drug and alcohol testing of driver trainers and the amendment to clarify police powers to search persons who have been taken into police custody for alcohol or drug testing under the Act.

As the changes to subject driver trainers to alcohol and drug testing involve amendments to a substantial number of provisions affecting several Acts, the human rights implications of those amendments will be discussed in this outline as well as in the clause notes. The provisions in the Bill authorising a police officer to request a person to provide sample of breath, oral fluid or blood for alcohol or drug testing and to take a person into custody for alcohol or drug testing may engage a number of human rights and the privilege against self-incrimination. The relevant human rights may include the right to privacy, the right to refuse consent to medical procedures and the right to liberty and security of the person.

Alcohol and drug testing of driver trainers

By way of background, it should be explained that the amendments to subject driver trainers to alcohol and drug testing address an unintended gap in the legislation that was identified following the introduction of the zero BAC for driver trainers that was introduced by amendments to the legislation last year. Most other Australian jurisdictions including NSW, Victoria, Queensland, South Australia and the Northern Territory provide for persons who supervise learner drivers to be subject to drink driving laws. This has been done on the basis that although they are not physically driving the vehicle they are nevertheless in charge of the vehicle and will be required to exercise control over the driver and vehicle in an emergency.

Australia is not alone in requiring driver supervisors to remain sober while instructing or supervising learner drivers - for example, the United Kingdom applies its drink driving laws to driver trainers and supervisors. The ACT's zero BAC laws for driver trainers did not provide a clear nexus with the alcohol screening powers and offence provisions. Other jurisdictions have all quite explicitly applied their alcohol and drug testing powers, and the associated offence provisions, to driver trainers (however described).

Section 28 of the *Human Rights Act 2004* requires a consideration as to whether the provisions of the Bill impose 'reasonable limits' on these rights and the extent to which these reasonable limits may be considered 'demonstrably justified' in a free and democratic society.

A critical role of the driver trainer is assisting in crash avoidance. In the Road Safety Grant Report 2009-003 "Factors influencing learner driver experiences"¹ which was based on detailed interviews conducted with around 392 recent learner drivers in New South Wales and Queensland² almost a quarter of the learner drivers reported being involved in a near-miss during the

¹ Department of Infrastructure, Transport, Regional Development and Local Government, April 2009. "*Factors Influencing learner Driver Experiences*", Ly del Bates, Barry Watson, Mark King. Centre for Accident Research and Road Safety - Queensland, Queensland University of Technology.

² Both of these jurisdictions provide for alcohol and drug testing of driver supervisors/trainers.

learner driver stage. It is significant that the crash rates for novice drivers rise sharply when learner drivers gain their “P” plates and cease to drive with supervision; this increase in the accident rates highlights the ‘control’ role played by effective driver trainers. If a driver trainer is impaired by alcohol or drugs, the trainer’s ability to exercise adequate control over the vehicle and learner driver is reduced and the risk of harm, both to the learner driver and other road users, is thereby increased. An intoxicated driver trainer may also be a distraction for the learner driver - intoxicated persons may be less inhibited, more aggressive, more argumentative or simply more talkative than usual. Any of these behaviours act to divide the learner driver’s attention from the driving task and increase the accident risk.

The rationale for applying drink and drug driving laws to driver trainers can also be better understood as a reasonable limitation on the rights of driver trainers if the way that learner drivers gain driving skills and insights into safer driver behaviours is explained. This process is dealt with in the Grant Report which discusses the role of unpaid supervisors (usually parents) and professional driving instructors in contributing to the learner driver experience. In this context, the role of parents in advocating and modelling appropriate driving behaviour cannot be ignored - the report notes there is a body of research to establish the relationship between parents’ own dangerous driving behaviour and that of their children.³

For these reasons, it is believed that the amendments to make driver trainers subject to the ACT’s drink and drug driving laws are reasonable limits that can be demonstrably justified in a free and democratic society, for the purposes of section 28 of the *Human Rights Act 2004*, particularly in light of the fact that the penalties specified for driver trainers are of a lesser order than the penalties for drivers (in line with practice in other Australian jurisdictions).

Search power where persons taken into custody for alcohol or drug testing

The amendments to provide a power to search persons taken into custody for alcohol or drug testing are included in this Act to clarify the legal basis for conducting these searches. While there are search powers in other legislation in force in the Territory, including the ACT and Commonwealth Crimes Acts, that might apply to persons taken into custody for offences under the road transport legislation, it is not completely clear that these powers apply during the time that a person is in police custody for alcohol and drug testing under the *Road Transport (Alcohol and Drugs) Act 1977*.

Intoxicated persons taken into custody for testing under the Act are sometimes found to be carrying knives, prohibited weapons and other harmful items (including drugs). Police do confiscate such items, as the combination of an intoxicated person and a weapon or drug of dependence gives rise to an obvious risk of harm or injury, either to the person themselves or to others.

³ At page 9 of the Report.

The proposed search power is modelled on the search power in section 5 of the *Intoxicated People (Care and Protection) Act 1994*. As the *Road Transport (Alcohol and Drugs) Act 1977* requires that the person must not be detained in police custody for any longer than is necessary for carrying out drug or alcohol testing, these search powers have been drafted as simply as possible so the person can be tested and released as soon as possible.

While the power undoubtedly engages rights under the *Human Rights Act 2004*, such as the right to privacy under section 12, the right to liberty and security of the person under section 18 and the right under section 19 to humane treatment when deprived of liberty, the following matters should be noted:

- the purpose of the search is to reduce the risk of harm to the driver and to others during the driver's period in custody. Risk-reduction searches of this nature reflect the duty of care owed by police to persons in custody, especially intoxicated persons, which was recognised in recommendation 122 and related recommendations dealing with the custodial care of intoxicated persons in the 1991 *Final Report of the Royal Commission into Aboriginal Deaths in Custody*;
- the power of detention under the Act is essential for the purpose of conducting alcohol and drug tests; detention is for a short duration but the risks of harm are similar to those that apply to persons in police custody for longer periods, including the risks associated with persons being transported. Similar search powers exist under other Acts that provide for a person to be taken into police custody (for example, the *Crimes Act 1900* and the *Intoxicated People (Care and Protection) Act 1994*). As neither of those Acts covers people in custody under this particular Act, a specific search power is necessary to allow these risks to be mitigated;
- drivers in custody for alcohol or drug testing may be taken to a hospital or sampling facility where they are likely to come into contact with other people. The police are responsible for the safety of those other people at those places when they bring the driver in to be tested; if they have no power to search an intoxicated driver for weapons or to remove any such weapons, they cannot guarantee the safety of medical personnel or other patients at the hospital or sampling facility if the intoxicated driver becomes aggressive.

The amendments clarify the legal basis for conducting these searches. The Government believes that the amendments are reasonable limits that can be demonstrably justified in a free and democratic society for the purposes of section 28 of the *Human Rights Act 2004*. It is desirable for ACT Policing to have legislative authority for conducting preventative searches of this type so it can discharge its common law duty of care to drivers who are taken into custody for alcohol or drug testing under the Act.

Notes on clauses

Part 1 Preliminary

Clause 1 Name of Act

This is a formal provision that sets out the name of the legislation on its enactment.

Clause 2 Commencement

This clause provides for the Bill, once passed, to commence on the day following its notification.

Clause 3 Legislation amended

This clause lists the legislation amended by the Act.

Part 2 Crimes Act 1900

Clause 4 Power to enter premises to arrest offender Section 220 (4), definition of *relevant offence*, paragraph (b) (iv),

This clause makes a consequential amendment to section 220 of the *Crimes Act 1900* to reflect the application of drink and drug driving laws to driver trainers.

Part 3 Road Transport (Alcohol and Drugs) Act 1977

Clause 5 Meaning of *public place* Section 4A

This clause omits the definition of *public place*. This amendment is one of a series of related amendments to replace the concepts of *public street* and *public place* with *road* and *road related area*. *Road* and *road related area* are the terms used in the ACT road transport legislation and national transport legislation. The *Road Transport (General) Act 1999*, section 12 (1) (a) provides a power to determine that an area is a *road related area* for the purposes of the road transport legislation. It is anticipated that this power could be used to ensure that all areas currently covered by the concepts of *public street* and *public place* are covered by the replacement concepts of *road* and *road related area*. Additionally, a regulation making power is included by clause 72 to prescribe areas as *road related areas* for the purpose of the *Road Transport (Alcohol and Drugs) Act 1977* (the Act).

**Clause 6 Meaning of *special driver*
Section 4B (1) (a)**

This clause substitutes paragraph 4B (1) (a) and inserts new paragraph 4B (1) (aa) in the definition of “special driver”. Paragraph (a) deals with persons who do not hold any licence that is equivalent to an Australian driver licence and, in effect, have an unknown driving ability.

New paragraph 4B (1) (aa) deals with people who either hold a foreign driver licence from a country that is not on the list of countries recognised as having equivalent driver licensing standards, or whose foreign driver licence from a recognised country is equivalent to a learner, provisional, probationary or restricted licence. The intention of these amendments is to ensure that foreign drivers with equivalent driver licence status to ACT drivers are subject to the same BAC as their ACT counterparts. A similar approach to applying differential BACs to foreign drivers, depending on their licence class equivalency, is taken in other Australian jurisdictions. It should be noted that the list of recognised countries is maintained by Austroads aegis of the national licensing and registration taskforce, which has representatives from all jurisdictions’ road transport authorities.

Clause 7 Section 4B (3)

This clause includes definitions of Austroads and recognised country in section 4B. These amendments are consequential on the amendments in clause 6.

Clause 8 New section 4BA

The clause inserts new section 4BA, which defines the term *driver trainer*. A driver trainer is a *driving supervisor*, *driving assessor* or a *heavy vehicle driver assessor*. These terms are already defined in section 4B (3). They cover the people who occupy the seat next to a learner driver and who are, although not driving the vehicle themselves, in a position to exercise control over the vehicle and/or the learner driver.

Clause 9 Section 8

This clause substitutes a new section 8. The replacement section is based on the current section 8, but is modified in two respects. The first modification is to replace references to public street and public place with road and road related area. The second modification is to apply the power to require a person to undergo a random alcohol screening test to the driver trainer in a vehicle with a learner driver.

The amendments in this clause, and in the related clauses that apply the alcohol testing provisions to driver trainers, engage the right to privacy, the privilege against self-incrimination and the right to liberty. The right to self-incrimination is engaged in that drivers are being asked to provide samples that may show they have committed an offence.

It is believed that these amendments are proportionate and reasonable, as they are essential for giving effect to the prescribed alcohol concentration for driver trainers. As explained in the Outline, driver trainers must be in a position to take effective control of the vehicle or learner driver at any time in order to prevent an accident, and it is important that their reflexes are not affected by alcohol. Without these provisions, it would not be possible to determine whether a driver trainer had alcohol in his or her breath or blood, whether at the prescribed concentration or any other concentration.

The Bill provides for the detention of the driver trainer for alcohol testing in certain circumstances. A detention power is essential as the tests are not conducted in the person's vehicle; the person must be taken to another place for testing and kept there while the test is completed. The detention power is of very limited duration and is believed to be a reasonable and proportionate limitation on the right to liberty, as it is the only practicable means of ensuring that tests can be carried out properly.

There are various provisions in the Act that mitigate the impacts on human rights and the privilege against self-incrimination. These include the provisions to protect privacy (sections 13 and 13F), restrictions on the duration of custody (section 14) and limits on the purposes for which results can be used (sections 18B and 41A).

Clause 10 Section 9 heading

This clause amends the heading to section 9, to make it clear the provision deals only with drivers. This amendment is consequential on the amendment in the following clause to insert new section 9A, which deals with alcohol screening tests for driver trainers where a vehicle is involved in an accident.

Clause 11 New section 9A

This clause inserts a new section 9A to allow for alcohol screening tests of driver trainers where a vehicle is involved in an accident. The provision is modelled on existing section 9, with modifications to apply to driver trainers rather than drivers. It applies in either of two situations:

- where a police officer has reasonable cause to suspect that a person was the driver trainer in a vehicle at the time of the accident;
- the police officer does not know or has doubt as to who was the driver trainer in the vehicle at the time of the accident, and has reasonable cause to suspect that the person was in the vehicle at the time of the accident.

For example, if there are three occupants of a vehicle at the time of an accident, one is a learner driver, one an unlicensed driver and one is fully licensed, and the fully licensed driver is found occupying the seat next to the learner driver at the scene of the accident, it would be reasonable for police to

assume that the fully licensed driver was the driver trainer for the learner driver at the time of the accident.

Clause 12 Section 10 heading

This clause amends the heading to section 10 to include references to drivers and driver trainers.

Clause 13 New section 10 (2)

This clause inserts a new section 10 (2), which applies where the police have reasonable cause to suspect the person is the driver trainer in a vehicle involved in a culpable driving offence. The person may be required to undergo an alcohol screening test. This power mirrors the power in existing section 10, in relation to drivers of vehicles in suspected culpable driving offences.

**Clause 14 Detention for breath analysis
Section 11 (1) (a) and (b)**

This clause makes consequential amendments to these provisions to insert references to new section 9A.

**Clause 15 Breath analysis
Section 12 (5), new example**

This clause is a technical amendment to include a new example of a written statement for the purposes of section 12 (5), to make it clear that an electronic print-out from a breath analysis instrument is a statement for section 12 (5). Modern analysis instruments are programmed to produce detailed printouts about the analysis, including the date, instrument number, model, location, time, operator and results - requiring the police officer who supervises an analysis to prepare a separate written statement that duplicates this information is not an efficient use of resources.

Clause 16 Section 13A

This amendment is similar in effect to the amendment to section 8. It replaces existing section 13A, which is the power to conduct random drug testing for drivers, with a power to conduct random drug testing of drivers and driver trainers. Like replacement section 8, it also replaces references to *public street* and *public place* with *road* and *road related area*.

The amendments in this clause, and in the related clauses that apply the drug testing provisions to driver trainers, engage the right to privacy, the privilege against self-incrimination and the right to liberty. The right to self-incrimination is engaged in that drivers are being asked to provide samples that may show they have committed an offence.

It is believed that these amendments are proportionate and reasonable, as they are essential for giving effect to drug driving laws for driver trainers. As explained in the Outline, driver trainers must be in a position to take effective control of the vehicle or learner driver at any time in order to prevent an accident, and it is important that their reflexes are not affected by drugs. Without these provisions, it would not be possible to determine whether a driver trainer had a prescribed drug in his oral fluid or blood.

The Bill provides for the detention of the driver trainer for alcohol testing in certain circumstances. A detention power is essential as the tests are not conducted in the person's vehicle; the person must be taken to another place for testing and kept there while the test is completed. The detention power is of very limited duration and is believed to be a reasonable and proportionate limitation on the right to liberty, as it is the only practicable means of ensuring that tests can be carried out properly.

There are also provisions in the Act that mitigate the impacts on human rights and the privilege against self-incrimination. These include the provisions to protect privacy (sections 13 and 13F), restrictions on the duration of custody (section 14) and limits on the purposes for which results can be used (sections 18B and 41A).

Clause 17 Section 13B heading

This clause amends the heading to section 13B, to make it clear that this provision deals only with drivers. This amendment is consequential on the amendment in the following clause to insert new section 13BA, which deals with drug screening tests for driver trainers where a vehicle is involved in an accident.

Clause 18 New section 13BA

This clause inserts new section 13BA, to allow for drug screening tests of driver trainers where a vehicle is involved in an accident. Like new section 9A, it deals with the situations:

- where a police officer has reasonable cause to suspect that a person was the driver trainer in a vehicle at the time of the accident;
- the police office does not know or has doubt as who was the driver trainer in the vehicle at the time of the accident, and has reasonable cause to suspect that the person was in the vehicle at the time of the accident.

Clause 19 Section 13C heading

This clause amends the heading to section 13C to include references to drivers and driver trainers.

Clause 20 New section 13C (1A)

This clause inserts a new section 13C (1A), which applies where a police officer has reasonable cause to suspect a person was the driver trainer in a vehicle involved in a culpable driving offence. The person may be required to undergo a drug screening test. This power mirrors the power in existing section 13C, in relation to drivers of vehicles in suspected culpable driving offences.

**Clause 21 Detention for oral fluid analysis
Section 13D (1) (a) and (b)**

This clause makes consequential amendments to these provisions to insert references to new section 13 BA.

**Clause 22 Oral fluid - preliminary analysis
Section 13E (6), new example**

This clause inserts a new example for section 13E (6), to make it clear that a print-out from an analysis instrument can be used as a statement for the purpose of section 13E. This amendment parallels the amendment in clause 15 in relation to breath analysis statements.

Clause 23 New section 13H

This section inserts new section 13H. This section makes it explicit that the chief police officer must arrange for the tested person to be notified of the results of a confirmatory oral fluid analysis under section 13G, and lists the matters to be included in the oral fluid analysis statement given to the person under this new section.

**Clause 24 Restrictions on tests etc under this part
Section 14 (1)**

This clause omits words from section 14 (1) that reflect analysis processes based on antiquated technology. These words were inadvertently retained when the section was amended in 2010. Before the advent of the modern Dräger breath analysis instrument, the operator manually switched on the instrument and 'purged' it of air. The driver then blew to fill a tank with a sample of deep lung air, and when the driver stopped blowing it was shut off and air was pushed through one ampoule. The operator then had to perform various functions with the analysis device in order to generate an electric charge within the ampoule in order to determine a reading from the sample - it was essentially an operator- controlled process. Modern alcohol and drug analysis instruments are automated to reduce the possibility of user error and sample contamination, with the instruments programmed to perform self-checking functions and print statements of analysis.

Clause 25 Section 14 (1) (b)

This is a consequential amendment to include a reference to driver trainers in section 14.

Clause 26 Section 14 (3) (c) (i) to (iii)

This clause is a consequential amendment to replace these subparagraphs with updated subparagraphs. The new provisions replace references to *public street* and *public place* with *road* and *road related area*, and include references to *driver trainers*.

**Clause 27 Taking blood samples from people in custody
Section 15 (1)**

This amendment inserts the words “or sampling facility” in section 15 (1). The purpose of the amendment, and the related amendments in the Bill, is to expand the venues at which blood samples may be taken from drivers. The legislation currently requires all drivers to be taken to hospitals for blood testing, whether or not they are injured. When combined with the short time frames in which blood samples must be taken, the result is to place pressure on resources at emergency departments in hospitals. It should be noted that a sample must still be taken by a doctor or a nurse at the sampling facility. In addition to relieving pressure on hospital staff, the amendment may reduce the amount of time drivers spend in police custody because it allows for samples to be collected at a place, such as a police station, that has been prescribed as a sampling facility for the Act. This means that drivers who are not injured will no longer need to be transported between the police station and the hospital. The amendments may also result in greater privacy for drivers while blood tests are carried out.

Clause 28 Section 15 (4)

This amendment is consequential on the amendment to section 15 (1) of the Act to provide for testing at a *sampling facility*.

Clause 29 Section 15 (4)

Like clause 28, this amendment is consequential on the amendment to section 15 (1) of the Act to provide for testing at a *sampling facility*.

**Clause 30 Taking blood samples from people in hospital
Section 15AA (1) (c) (i)**

This is a consequential amendment to include a reference to *driver trainer* in the provisions dealing with taking blood samples from people in hospital. As previously explained, it is believed that the provisions in the Bill for taking blood samples from driver trainers are a reasonable limitation on the rights of drivers for the purposes of section 28 of the *Human Rights Act 2004* given the important road safety purpose of ensuring that driver trainers are capable of

the Act, or a culpable driving offence has a prescribed drug present in his or her body.

Clause 33 Section 16 (3)

This amendment is related to the amendment in clause 28, and allows a sample under section 16 to be collected at a sampling facility.

Clause 34 Section 16 (4) to (6)

This clause makes consequential amendments to include references to *sampling facility* in these provisions.

**Clause 35 Analysis of body samples
Section 16A (2) (a) and (b)**

This clause is related to the amendment in clause 33 and ensures that samples collected under section 16 can be analysed to determine whether a prescribed drug was present in the tested person's body.

**Clause 36 Keeping of samples - request by DPP
Section 16C (1) (a)**

This clause is a technical amendment to ensure that the DPP's power to request the retention of a sample extends to oral fluid samples sent for confirmatory analysis. While it is probable that the concept of 'body sample' already encompasses an oral fluid sample sent for confirmatory analysis under section 13G, this amendment ensures that these samples may be retained under this section however they are categorised.

Clause 37 Section 16C (1) (b) (ii)

This clause is related to the amendment in clause 36 and ensures that the DPP's power to request the retention of a sample covers oral fluid samples sent for confirmatory analysis.

Clause 38 Section 16C (4), definition of *preserved part*, new paragraph (aa)

This clause is also related to the amendments in clauses 36 and 37. It includes the definition of *preserved part* of a reference to oral fluid samples collected under section 13G.

Clause 39 Section 16 (4), definition of *preserved part*, paragraph (b)

This clause is a technical amendment that is consequential on the amendment in clause 38. It provides for an amended definition of *preserved part* for body samples other than oral fluid samples.

Clause 40 Destruction of samples
Section 16D (1)

This clause is another technical amendment to provide that the requirement to destroy body samples after a certain period of time applies to oral fluid samples sent for confirmatory analysis under section 13G.

Clause 41 Section 16D (2)

Like clause 40, this clause ensures that the requirement to destroy body samples after a certain period of time applies to oral fluid samples sent for confirmatory analysis under section 13G.

Clause 42 New division 2.8

This clause inserts new division 2.8 into the Act. This Division provides for search and seizure powers, and consists of a single provision, new section 18C “Power to search person in custody.” The power applies to persons who are in custody for alcohol or drug testing under the Act. In this context, it should be noted that the Act imposes time limits on the duration of custody for the purposes of alcohol or drug testing. Any searches must be conducted within these time limits, therefore the search power itself needs to be appropriate to the circumstances.

As mentioned in the Outline to this Explanatory Statement, this search power is based on section 5 of the *Intoxicated People (Care and Protection) Act 1994*. That provision was enacted in response to the numerous recommendations relating to the reception and care of detained intoxicated persons in police custody, including recommendations relating to the removal of any items likely to result in acts of self-harm, following the release in 1991 of the *Final Report of the Royal Commission into Aboriginal Deaths in Custody*. The Government believes this power is a reasonable limitation of human rights for the reasons mentioned in the Outline.

Like the search power in the *Intoxicated People (Care and Protection) Act 1994*, it is not a forensic or evidentiary search provision. To state it another way, its purpose is not to find evidence to establish the person’s involvement in the commission of any offence, but to contain the risk of injury or harm. As such, the search power is not dependent on a police officer having reasonable cause either to suspect or to believe that he or she will find any particular item when he or she undertakes the search. The purpose of reception screening is to consider every item in the possession of person in custody and assess its risk potential.

New section 18C (1) provides police with the authority to search persons taken into custody for testing under the Act and authorises the police to take possession of anything found in the person’s possession. It is not intended that the police would use this power to authorise an arbitrary seizure of everything the person has with them - the purpose is to enable them to

temporarily remove whichever items are believed to pose a possible safety risk, noting that the person is entitled under section 18C (3) to the return of items taken under section 18C (1) when detention ends - which will generally be within an hour or so. As such, the 'seizure' authorised by this provision is generally temporary and is believed to be a reasonable limitation on human rights, given that its purpose is to enable police to ensure the safety of the person being tested and other people.

New section 18C (2) provides that the officer conducting the search may request the assistance of another police officer of the same sex as the person being searched. As this is a protective search provision involving intoxicated drivers, rather than a forensic search provision, it is appropriate to allow the police some degree of operational discretion as to the officers involved in the search.

As noted above, new section 18 (3) provides for the return of items to the person when the person ceases to be in custody. There are two limitations on the right of return. The first is that the police are not required to return 'seizable items' under the *Crimes Act 1900* (the note explains that 'seizable item' includes an item that would present a danger to a person or that could be used to assist a person to escape from lawful custody) or other items that the police may otherwise seize or retain under Territory law (for example, a fake driver licence that is seizable under section 59 of the *Road Transport (General) Act 1999*). The reason for retaining seizable items is to ensure the person cannot use the item to cause harm or injury to themselves or another person when leaving custody or soon after, - noting that in many cases the person will still be quite affected by alcohol and/or drugs - or to prevent them giving the seizable item to another person in the police station. Again, an item would not be regarded as 'seizable' unless it was something that posed a significant risk of harm - for example, a weapon.

New section 18C (4) explains the type of search that may be conducted - it is essentially an examination of the person's outer garments and possessions. As explained earlier, this provision is based on the power in section 5 of the *Intoxicated People (Care and Protection) Act 1994*. The Explanatory Statement and the Second Reading (Presentation Speech) for the Bill for that provision made it clear that provision was not an exhaustive search power. The restriction to outer garments and possessions will reduce its impact on the privacy of the person being searched.

Clause 43 Prescribed concentration of alcohol in blood or breath Section 19 (1) (a)

This clause amends this provision in two respects. The first amendment replaces references to *public street* and *public place* with *road* and *road related area*. The second amendment ensures that the 'prescribed concentration of alcohol', which is the most commonly used drink driving offence for drivers, also applies to driver trainers. The penalties and sentencing options for this offence and other offences involving driver trainers are discussed in more detailed in the clause notes for clauses 55 and 56.

Clause 44 Section 19 (5), definition of *relevant period*

This clause is a consequential amendment to include a reference to driver trainers in section 19 (5).

**Clause 45 Defence if driver did not intend to drive motor vehicle
Section 19A**

This clause is part of the series of amendments to replace *public street* and *public place* with *road* and *road related area* in the Act.

**Clause 46 Defence if special driver with lower concentration of alcohol
from allowable source
Section 19B**

This amendment corrects a drafting error that occurred when this defence provision, which is based on section 11A of the New South Wales *Road Transport (Safety and Traffic Management) Act 1999*, was transposed to this Act. Section 11A of the NSW law refers to the presence in the driver's breath or blood of the "novice range prescribed concentration of alcohol". In turn, section 8A of the NSW law defines "novice range prescribed concentration of alcohol" as a "concentration of more than zero grammes but less than 0.02 grammes of alcohol in 210 litres of breath or 100 millilitres of blood". This amendment ensures that the defence in section 19B will be available only for special drivers who record a BAC of less than 0.02 g.

Clause 47 Section 20 heading

This clause is a consequential amendment to include a reference to driver trainers in the heading for section 20. It is related to the amendment in clause 48, which applies the offence in section 20 to driver trainers.

Clause 48 Section 20 (1)

This clause replaces section 20 (1) with a redrafted provision that replaces references to public street and public place with road and road related area, and which includes references to the driver trainer in a vehicle. The effect of the latter modification is to ensure that driver trainers are covered by the principal drug driving offence in section 20.

Clause 49 Section 20 (4)

Like clause 47, this is a consequential amendment and inserts a reference to driver trainers.

**Clause 50 Refusing to provide breath sample
Section 22 (a)**

This clause replaces existing section 22 (a) with a redrafted provision that replaces references to public street and public place with road and road related area, and which includes references to the driver trainer in a vehicle.

**Clause 51 Refusing to provide oral fluid sample
Section 22A (1) (a)**

This clause replaces existing section 22A (1) (a) with a redrafted provision that replaces references to public street and public place with road and road related area, and which includes references to the driver trainer in a vehicle. It ensures the offence of refusing to provide an oral fluid sample can apply to driver trainers.

**Clause 52 Failing to stay for drug screening test
Section 22B (1), note 1**

This clause is a consequential amendment to insert a reference to new section 13BA in note 1, section 22. It ensures the offence of failing to stay for a drug screening test can apply to driver trainers.

**Clause 53 Refusing blood test etc
Section 23 (1) (a)**

This clause replaces existing section 23 (1) (a) with a redrafted provision that replaces references to public street and public place with road and road related area, and which includes references to the driver trainer in a vehicle. It ensures the offence of refusing a blood test can apply to driver trainers.

**Clause 54 Driver etc intoxicated
Section 24A (1)**

This clause replaces references to *public street* with *road* in section 24A (1), which deals with intoxicated drivers and riders of non-motorised transport on roads, such as bicycles and animal-powered options.

**Clause 55 Fines and imprisonment - section 19 offence
New section 26 (3)**

This amendment excludes driver trainers from the imprisonment option for section 19 offences. The policy in other jurisdictions is to specify slightly lower order penalties for driver trainers than drivers in relation to the primary offences of having a particular alcohol concentration or having a specified drug present in the person's blood or oral fluid, and this policy has been followed in this Bill where the Government has adopted this policy where differentiation can be achieved without sacrificing deterrence value.

**Clause 56 Automatic driver licence disqualification - first offenders, s 19
Section 32 (2)**

This clause excludes driver trainers from the operation of the automatic driver licence disqualification that would otherwise apply in respect of a conviction for a section 19 offence.

This exclusion (and the related amendments in clauses 57 and 58) does not mean the court cannot disqualify the driver trainer for the offence. Section 64 of the *Road Transport (General) Act 1999* provides that when a court convicts or finds a person guilty of any offence against the road transport legislation, the court can impose a period of licence disqualification for the offence in addition to any other penalty. It is intended that the court would use the power in section 64 to set a period of licence disqualification for those cases where it considers disqualification to be an appropriate sentencing outcome. It should be remembered that the concept of 'driver trainer' is broad and covers professional driving instructors, parents who accompany their teenage or young adult learner drivers and persons authorised by the road transport authority to assess heavy vehicle learner drivers.

In determining the appropriate sentence for an unpaid driver trainer with a low range BAC who is the sole parent of a learner driver, for example, the court may wish to take account of the impact on the relevant learner driver's ability to complete his or her driver training if the driver trainer is disqualified from driving. On the other hand, a significant period of licence disqualification may seem an appropriate sentencing outcome for a professional driving instructor who has recorded a high level BAC while instructing or assessing a learner driver. In the absence of any mandated penalties or sanctions for driver trainers, the usual sentencing principles would apply.

**Clause 57 Automatic driver licence disqualification - repeat offenders, s 19
Section 33 (2)**

This clause makes a consequential amendment to insert the words 'other than a driver trainer' in this provision. As with clause 56, the effect is to exclude driver trainers from the automatic disqualification provisions for repeat section 19 offenders and to leave the period of licence disqualification, if any, to be determined by the sentencing court under section 64 of the *Road Transport (General) Act 1999*.

**Clause 58 Automatic driver licence disqualification - offences other than s 19
Section 34 (1) and (2)**

This clause makes a consequential amendment to insert the words 'other than a driver trainer' in this provision. As with clause 56, the effect is to exclude driver trainers from the automatic disqualification provisions for repeat

offenders against other provisions in the Act and to leave the period of licence disqualification, if any, to be determined by the sentencing court under section 64 of the *Road Transport (General) Act 1999*.

**Clause 59 Evidentiary certificates - drug-related tests
Section 41AA (4) (a)**

This clause is a technical amendment to correct a drafting omission.

**Clause 60 Evidentiary certificates - blood sample not taken
Section 41AC (b)**

This clause is a consequential amendment to include a reference to ‘sampling facility’ in this provision.

**Clause 61 Evidence for insurance purposes
Section 41A (1) (i)**

This is a consequential amendment to ensure this provision includes a reference to new section 13H (oral fluid analysis statements). It ensures that the provisions to prevent evidence derived from samples taken under the Act from being used against the tested person in civil proceedings will apply to oral fluid analysis statements.

Clause 62 Section 41A (1) (j)

Like the previous clause, this is a consequential amendment to ensure this provision includes a reference to new section 13H (oral fluid analysis statements).

Clause 63 Section 41A (2)

Like clauses 61 and 62, this is a consequential amendment to insert a reference to new section 13H.

**Clause 64 Section 41A (5) (b), definition of *relevant offence*,
paragraph b**

This is a consequential amendment to reflect the updated name of the offence in section 20.

**Clause 65 When police may move person’s vehicle
Section 48 (1) (b)**

This is a technical amendment to correct an omission in the Act. It ensures that the power to move vehicles when a person has been taken into custody under certain provisions of the Act applies where a person is taken into custody for drug testing under the Act.

**Clause 66 Regulation making power
New section 51 (2)**

This clause contains a power to make regulations to prescribe other areas that are road related areas for the Act. It is intended to supplement the power in section 12 of the *Road Transport (General) Act 1999*.

Clause 67 Dictionary, note 3

This is a consequential amendment to insert references to road and road related area. Those terms are defined in the *Road Transport (General) Act 1999*.

**Clause 68 Dictionary, definition of *disqualifying offence*
paragraph (b)**

This is a consequential amendment to reflect the updated name of the offence in section 20.

Clause 69 Dictionary, new definitions

This clause is a consequential amendment to insert a new definition of *driver trainer* and *external territory driver licence* in the Dictionary.

Clause 70 Dictionary, definitions of *public place* and *public street*

This clause is a consequential amendment to delete the definitions of public place and public street.

Clause 71 Dictionary, new definition of *sampling facility*

This clause is a consequential amendment to insert a definition of *sampling facility*. These facilities may be prescribed by regulation, as facilities where a doctor or nurse may take a blood sample under the Act.

Clause 72 Further amendments, mentions of *public street* or *public place*

This clause makes consequential amendments to various sections of the Act to replace references to *public street* or *in a public place* with *road* or *road related area*.

Part 4 Road Transport (Driver Licensing) Regulation 2000

**Clause 73 Meaning of *required medical standards*
Section 15 (1)**

This clause makes a technical amendment to reflect a change in Austroads's corporate identity. Austroads is the publisher for the required medical standards.

**Clause 74 Eligibility requirements for licence classes
Section 28 (3) (c) except note**

This clause clarifies the eligibility criteria when the holder of a foreign driver licence applies for an ACT driver licence of a particular class. The amended clause reflects the policy of Australian road transport and licensing authorities that a foreign driver licence does not correspond to an Australian driver licence of the same class or higher unless it was issued by a country on the list of recognised countries maintained by Austroads.

**Clause 75 Eligibility requirements for motorcycle licences
Section 29 (3) (c)**

This clause clarifies the eligibility criteria when the holder of a foreign driver licence applies for an ACT motorcycle licence. As with clause 74, the amended clause reflects the policy of Australian road transport and licensing authorities that a foreign licence does not correspond to a full motorcycle licence unless it was issued by a country on the list of recognised countries maintained by Austroads.

**Clause 76 Eligibility requirements for car licences etc
Section 30 (3) (c)**

This clause is related to the amendments in clauses 74 and 75, and clarifies the eligibility criteria when the holder of a foreign driver licence applies for an ACT car licence. As with clause 74, the amended clause reflects the policy of Australian road transport and licensing authorities that a foreign licence does not correspond to an Australian driver licence of the same class or higher unless was issued by a country on the list of recognised countries maintained by Austroads.

**Clause 77 Working out period a class or kind of licence has been held
Section 68**

This clause makes a consequential amendment, which has the effect of clarifying that it is only foreign driver licences issued under the law of a recognised country that relevant for the purposes of section 68 of this Regulation.

Clause 78 New section 141

This clause inserts new section 141 to explain what is meant by *recognised country*. The section includes a link to the Austroads website where the list of recognised countries. It should be noted that new section 141 (2) specifically displaces section 47 (6) of the *Legislation Act 2001* in relation to the list of recognised countries published on Austroad's website.

Clause 79 Dictionary, new definitions

This clause inserts new definitions for *Austroads* and *recognised country*.

Part 5 Road Transport (General) Act 1999

Clause 80 Section 61A, new definition of *driver trainer*

This clause is a consequential amendment to insert a definition of driver trainer in section 61A of *the Road Transport (General) Act 1999*.

Clause 81 Section 61A, definition of *immediate suspension offence (or suspension offence)*, paragraph (a) (i)

This clause is a consequential amendment to insert the words 'other than a driver trainer' in this paragraph. The purpose of the amendment is to ensure that the immediate licence suspension provisions do not apply to driver trainers. For the reasons outlined in the clause notes for clause 56, the intention of this provision is to exclude the application of automatic licence suspension provisions in relation to driver trainers.

Clause 82 Dictionary, new definition of *driver trainer*

This clause is a consequential amendment to insert a reference to *driver trainer* in the Dictionary to the *Road Transport (General) Act 1999*.

Part 6 Road Transport (Offences) Regulation

Clause 83 Schedule 1 heading

This clause is a drafting amendment to update the heading the Schedule.

Clause 84 Schedule 1, part 1.3, items 3 and 4, column 3

This clause is a drafting amendment to insert a reference to authorised nurse practitioners in the short description of the relevant items.

Clause 85 Schedule 1, part 1.3, items 6 to 19

This clause makes numerous consequential amendments to these items to reflect the change in terminology from public place/public street to road/road related area and to insert accommodate the application of the drink and drug driving offences to driver trainers.

Part 7 Spent Convictions Act 2000

Clauses 86 to 89 inclusive make consequential amendments to section 14 of the *Spent Convictions Act 2000* to insert references to driver trainers, or driver training, in that section. That section explains how certain traffic offences are to be dealt with for the purposes of the spent convictions legislation.
